closets in tenements); *Grumbach* v. *Lelands,* 154 Cal. 679 (excluding certain businesses); *Ex parte Quong Wo,* 161 Cal. 220 (hay barn, wood yard, laundry); *Matter of Montgomery,* 163 Cal. 457 (stone crusher, machine shop, carpet beating, lumber yard); *Cronin* v. *People,* 82 N. Y. 318 (slaughtering animals); *City of Rochester* v. *Guthberlett,* 211 N. Y. 309 (disposition of garbage); *City of Rochester* v. *West,* 164 N. Y. 510 (limiting height of billboards); *Welch* v. *Swasey,* 214 U. S. 91 (limiting height of buildings); *City of Rochester* v. *Macauley, &c., Co.,* 199 N. Y. 207 (smoke prohibition); *Union Oil Co.* v. *City of Portland,* 198 Fed. 441 (storing of oil); and generally any business, as well as the height and kind of building, may be regulated under power conferred upon it by the legislature. *Hauser v. No. British, &c., Co.,* 206 N. Y. 455.

A short summary of these cases indicates:

1. Zoning according to *use* may be made under the eminent domain power, but with conflicting views as to what is a *public use* (*Houghton* case, above). It would seem the taking here would create an *incumbrance,* although it does not under the police power (*Lincoln Trust* case, above). In theory, under eminent domain, a *beneficial* use is acquired; under the police power, a *harmful* use is prevented. The acquisition of the latter, under eminent domain, is a strange sort of "public use."

2. Zoning may be done under the police power, conferred expressly by constitutional and legislative provisions (*Opinions of Justices,* above).

3. Zoning may not be done under general or implied police power (though expressly claimed in a Home Rule charter); there must be express *legislative* authority (*Clements* case, above).

4. Unless the business excluded is a nuisance, or is likely to become such, to safety, health, or comfort (*Foundry, Kessler, East Cleveland,* and *Myers* cases, above).

5. Zoning may be based on *heights* and *areas* of buildings if the public welfare demands (*Swasey* case, cited, and *Bebb* and *Lincoln Trust* cases, above).

6. Aesthetic considerations alone are not sufficient, as a basis, under the police power (*Opinions of Justices*), and probably not under eminent domain (*Houghton* case), but there is a decided tendency to give it more and more weight.

7. Depreciation of values alone, perhaps, is not sufficient, but that, too, is being given greater weight, and seems to be the only substantial basis in the *Houghton* (eminent domain) and *Kessler* (police power) cases above. Also the dissenting opinion of Hallam, J., in the *Lachtman* case, cited above.

H. L. W.

PRIVILEGED COMMUNICATION BETWEEN PHYSICIAN AND PATIENT—WAIVER. —The case of *Maine* v. *Maryland Casualty Company et al.,* — Wis. —, 178 N. W. 749, involves the question of privileged communication and its waiver under a statute providing that a physician "shall not be permitted to disclose any information which he may have acquired in attending any patient

in a professional character," etc. The action was brought on an accident insurance policy and the testimony of the physician was offered to show that the death of the insured was caused accidentally, within the provisions of the policy, his information having been gained while acting in his professional character as the physician of the insured following the accident.

The court holds, in accordance with the general rule, that, notwithstanding the positive character of the statute—"shall not be permitted to disclose" —it is to be regarded as a protection to the patient rather han as a mere inhibition to the physician, and therefore is a privilege or protection which may be waived by him.

It is further held that his waiver is not to be implied from the fact that the contract of insurance provided for the making of the proofs of death as having resulted from causes within the provisions of the policy. It is quite uniformly held that these statutory provisions should not be so construed as to defeat the claim of waiver by conduct. Should the patient ask his physician or his lawyer to witness his will it is a waiver of the right of the client or patient to have the information gained by the lawyer or physician while serving him professionally in connection with the execution of the will protected from disclosure. This conclusion is arrived at through the application of the principle that where the circumstances are such as to justify the conclusion that the patient or client could not have expected the information to be kept secret, then there is no confidence to be protected. Here the insured had made a contract, under which, if he should die, the question of the cause of his death would be an important one, and the physician who should attend him in his last illness would be the person, above all others, by whom the cause of death could be most appropriately and satisfactorily established. But further, his contract requires that the circumstances of his death shall be disclosed. Is it not a reasonable conclusion that as between himself and his insurer at least he must have understood that those circumstances were not to be kept secret? In which event there is no confidence to be betrayed. There is certainly much reason for concluding that had he actually contemplated the precise question here being discussed he would have expected that his physician when called to support his contract of insurance would be allowed to testify.

The court further holds that not only was there no evidence justifying a finding that the insured had waived the privilege, but that after his death there was no one who could waive it. In this conclusion the court was controlled by the authority of *Casson* v. *Schoenfield,* 166 Wis. 401, L. R. A. 1918C, 162. The general rule would seem to be *contra: Johnson* v. *Fidelity & Casualty Co.,* 184 Mich. 406, L. R. A. 1916A, 475 (a case of waiver by a beneficiary under an insurance policy); *Penn Mutual Life Insurance Co.* v. *Wiler,* 100 Ind. 92 (same); *Denning* v. *Butcher,* 91 Ia. 425 (executor); *Groll* v. *Tower,* 85 Mo. 249 (any person claiming under deceased); *Fraser* v. *Jennison,* 42 Mich. 206 (personal representative).

But the privilege being the insured's and not the insurer's, what right has he, the insurer, whose every interest is antagonistic, to raise this ques-

tion of the insured's privilege? The rule is very clear that it is not for either party to litigation to interfere to prevent a witness from testifying to his own guilt of crime, though he is privileged not to do so, *and this because the privilege is not theirs. R.* v. *King Lake,* 11 Cox Cr. 500, 22 L. T. R. (N. S.) 335; *Samuel* v. *People,* 164 Ill. 379; *Cloyes* v. *Thayer,* 3 Hill 564; see Wright, J., in *Russ* v. *Steamboat War Eagle,* 14 Ia. 363, 375 (involving right of party to object that examination of witness involved disclosure of marital confidences). Are the circumstances in a case like that under consideration so different as to impose an obligation upon one party or the other to protect the privilege of one to whose interests his own are diametrically opposed. If the testimony is received against the objection of the insurer that it is privileged, can he assign error on the ruling? Upon what theory can he claim to be prejudiced when the privilege was another's and not his own? A stranger is not to be heard in protection of the privilege of another while living and able to insist upon it or waive it as he may please. Upon what theory does death make the stranger the guardian of that privilege?

One of the most fundamental of procedural principles is that all evidence having probative value should be received. While the law is opposed to compulsory disclosure of that which it has said may be kept secret, still there is no prejudice in the law against disclosure where privilege is not claimed. It is to be claimed by whom? Surely not by one in the service of his own interest as against that claimed through the one privileged.

V. H. L.

TRIAL—USE OF UNPROVED MAP OR DIAGRAM IN ARGUMENT TO THE JURY.—In the trial of an action for an unlawful entry and detainer, counsel, against the objection of the party opposing, in his argument to the jury was allowed to use a rough sketch or diagram of the *locus in quo,* made by his client, the defendant, for the purpose of assisting the jury to understand the bearing of the testimony in the case. No witness had testified upon inspection of the diagram that it correctly represented the situation involved, nor did counsel claim that there was such testimony. What counsel evidently was claiming was that the testimony of the witnesses testifying in the case did establish the existence of facts illustrated by the diagram.

It was held by the reviewing court that such use of the diagram in argument to the jury was proper. *Wilson et al.* v. *McCoy et al.* (W. Va., 1920), 103 S. E. 42.

In another case reported in the same volume, on a trial for murder in which one of the defenses was that the defendant was insane, his counsel was allowed by the trial court, against objection ,to use a sketch prepared by himself, in his argument to the jury. Considerable testimony was before the jury tending to show that several of the blood kindred of defendant, on both his father's and mother's side, were or had been insane, and that several had committed suicide.

Counsel had sketched a "genealogical tree" upon the basis of the testimony of the witnesses in the case, to present graphically these facts, claimed